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No. 80-1550

IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

PAUL E. TINSLEY, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Since this case involves the same questions as were presented in **Clayton v. ITT Gilfillan** (No. 80-54), in which this Court granted certiorari, should not this Court grant certiorari here, so that this case can be decided with and controlled by the Court's decision in **Clayton**?

2. Does the Employee's failure to exhaust internal union remedies, which were found to be adequate by the District Court and the Court of Appeals, bar his action against the Company as well as against the Union?

3. Does the fact that the internal union remedies provide only monetary damages and do not provide for reinstatement make those remedies "inadequate" as a defense for the Company?

4. May internal union remedies be deemed adequate to bar an action against the Union because of the Employee's failure to exhaust those remedies, but be deemed inadequate to bar an action against the Company because they cannot provide reinstatement of the grievance?

5. Is the Union a necessary and indispensable party for the Employee to prove that the Union breached its duty of fair representation?

6. May an employee who chooses not to exhaust internal union procedures proceed solely against the Company and require the Company to present the Union's defense to the alleged breach of the duty of fair representation?

PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were United Parcel Service, Inc., (petitioner in this Court), Paul E. Tinsley, Jr., (respondent in this Court), and Highway Drivers, Dockmen, Spotters, Rampmen, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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No.

IN THE

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October Term, 1980

UNITED PARCEL SERVICE, INC.,
Petitioner,

v.

PAUL E. TINSLEY, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Parcel Service, Inc., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on December 12, 1980.[1]

OPINIONS BELOW

The Order of the United States District Court for the Central District of Illinois granting United Parcel Service's motion to dismiss (A28)[2] has not been officially reported.

1. Pursuant to Supreme Court Rule 28.1, United Parcel Service states that it is a wholly owned subsidiary of United Parcel Service of America, Inc. United Parcel Service of America, Inc., is affiliated with Service Plants Corporation ("SPC"), a holding company whose subsidiaries (all wholly-owned) own and lease real estate to UPS. Owners of UPS capital stock own beneficial interests in SPC common stock.

2. References herein to "A" pages are to pages in the appendix to this petition.

The Opinion of the United States Court of Appeals for the Seventh Circuit (A1), reversing the order of the District Court with respect to United Parcel Service, has been officially reported at 635 F. 2d 1288.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1980 (A29). United Parcel Service is filing this petition for a writ of certiorari within ninety days of the Court of Appeals' decision.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Section 301(a) of the **Labor Management Relations Act of 1947,** 29 U. S. C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 101(a)(4) of the **Labor-Management Reporting and Disclosure Act of 1959,** 29 U. S. C. § 411(a)(4), provides as follows:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in

such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof*: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition. (Emphasis added).

Rule 19 of the **Federal Rules of Civil Procedure** provides as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue

and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudical to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

STATEMENT OF THE CASE

Respondent, Paul E. Tinsley, Jr. (hereinafter "Tinsley"), was discharged from his employment with United Parcel Service, Inc. (hereinafter "UPS") on October 20, 1977, for repeated failure to follow supervisory instructions. Tinsley, a member of the Highway Drivers, Dockmen, Spotters, Rampmen, Packing House and Allied Products Drivers and Helpers, Office Workers, and Miscellaneous Employees Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 710" or "the Union"), protested his discharge to his steward, and Local 710 then filed a grievance on Tinsley's behalf. The grievance was brought before the joint United Parcel

Service-Local 710 Grievance Committee, the final step in the grievance procedure before arbitration. On November 4, 1977, Tinsley was advised that his grievance had been denied by the Joint Grievance Committee, and that he would not be reinstated to his job. The Union declined to submit Tinsley's grievance to binding arbitration.

The Constitution and By-laws of Local 710, together with the Constitution of the International Brotherhood of Teamsters which is incorporated by reference into the Constitution and By-laws of Local 710, afford detailed internal union remedies whereby Tinsley could have contested the decision of Local 710 not to press his grievance to binding arbitration. However, at no time did Tinsley exhaust or even attempt to exhaust those remedies. On the contrary, on August 4, 1978, Tinsley commenced this lawsuit by filing a complaint in the United States District Court for the Central District of Illinois, claiming that UPS had discharged him in violation of the collective bargaining agreement and that the Union had breached its duty of fair representation.

Local 710 filed a motion to dismiss and/or for summary judgment pursuant to Rules 12(b) and 56 of the **Federal Rules of Civil Procedure.** In an order dated May 16, 1979, the District Court adopted the April 10, 1979 recommendation of United States Magistrate Charles H. Evans (A14) and entered summary judgment in favor of Local 710 "due to Plaintiff's failure to initiate and exhaust his internal union remedies." (A26-27).

UPS then filed a motion to dismiss and/or for summary judgment and a supporting memorandum on the ground that, having granted summary judgment in favor of the Union, the District Court also should grant summary judgment in favor of UPS. On November 19, 1979, the District Court entered an order granting UPS's motion for summary judgment (A28).

Tinsley appealed the District Court's orders granting summary judgment in favor of Local 710 and UPS. On December 12, 1980, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's ruling with respect to Local 710, but reversed with respect to UPS. Specifically, the Court of Appeals held that Tinsley's admitted failure to initiate and exhaust his internal Union remedies barred his action against Local 710. However, although finding the internal union remedies fully adequate to afford Tinsley redress from the Union, the Court of Appeals held that Tinsley's failure to initiate and exhaust those remedies did not bar his action against UPS. In so holding, the Court of Appeals reasoned that the internal union remedies were inadequate with respect to Tinsley's claim against UPS, since they could afford Tinsley monetary relief only and could not reinstitute his grievance or get his job back for him.

In reaching this conclusion, the Court of Appeals relied heavily upon **Clayton v. ITT Gilfillan,** 623 F. 2d 563 (9th Cir.), *cert. granted,* 49 U. S. L. W. 3332 (Nov. 3, 1980) (No. 80-54). Nevertheless, rather than hold the case pending this Court's decision in the **Clayton** case, the court below chose to issue its opinion, stating

> We are not unmindful that subsequent to oral argument, and while this opinion was in the process of preparation, the Supreme Court granted certiorari in *Clayton v. ITT Gilfillan.* As noted in the foregoing opinion, a conflict among the circuits does exist, a basis for the grant of certiorari. While we remain sympathetic to the position of UPS, we decline to defer our decision in the present appeal, being of the opinion that the result we have reached is the correct one under existing law.

(A13, n. 15).

REASONS FOR GRANTING THE WRIT

In **Clayton v. ITT Gilfillan,** 623 F. 2d 563 (9th Cir. 1980), *cert. granted,* 49 U. S. L. W. 3332 (Nov. 3, 1980) (No. 80-54), this Court granted a writ of certiorari in a case involving issues identical to those raised in the instant case. *See* Petition for a Writ of Certiorari, **ITT Gilfillan v. Clayton,** No. 80-54, at ii-iii. It should do the same here.

I. This Case Should Be Controlled by and Decided With Clayton v. ITT Gilfillan.

Even at the time this case was decided by the Court of Appeals, certiorari had been granted by this Court in **Clayton** and the briefing schedule begun. Briefing in **Clayton** is now complete and that case in fact has already been argued. Hence, although petitioner has advanced arguments which differ in some regards from those advanced by petitioner in **Clayton,** it is obvious that this case cannot be subject to other than summary disposition by the Court. On the other hand, it is equally clear that the Court will have all the papers in this case before it when it decides **Clayton** and we respectfully suggest that it would be more appropriate for the Court to apply its **Clayton** ruling to this case than to deny review.

Indeed, we believe that the Court of Appeals in the present case would have done better to have held its ruling for whatever part of the six months between its December 1980 ruling and the end of Term in June 1981 was required for this Court to decide the **Clayton** case rather than to try on its own to resolve what it recognized as a clear conflict among the Circuits. Since the court below did not choose that course, petitioner here has been left the choice of either accepting what it believes to be an incorrect ruling, knowing that this Court will resolve

the question decided by the court below within months, or petitioning this Court to review this case along with the **Clayton** case. Since the **Clayton** case was decided by the Ninth Circuit before this case was decided by the Seventh, failure to seek review here on petitioner's part would lead to the anomalous result of applying this Court's **Clayton** ruling to the earlier case and not the later.

If a major purpose of this Court's certiorari jurisdiction is to prevent unseemly conflicts among the courts of the different circuits in interpreting federal law, certainly review of the present case will further that purpose. Moreover, a proper respect for the rulings of this Court requires that those rulings be applied to all cases that are open to review at the time the Court announces its decision. The only way that this Court's **Clayton** decision can be applied to the present case is if the Court grants certiorari and makes its ruling applicable here.

II. The Reasons Which Led This Court to Grant Certiorari in Clayton v. ITT Gilfillan Are Significant and Justify the Same Action in This Case.

There are significant reasons why this Court should consider the question presented in the present case as well as in the **Clayton** case. Indeed, beyond the reasons advanced in the petition for certiorari in **Clayton,** this Court's decision in **Vaca v. Sipes,** 386 U. S. 171 (1967), establishes that the need for apportionment of damages in Section 301 suits arising from the failure of the union to satisfy its duty of fair representation makes it extraordinarily difficult to try such cases against the employer alone.

A. There Is a Conflict Among the Circuits, Which Continues to Proliferate.

The lower courts are in irreconcilable conflict as to whether, and under what circumstances, the failure to

exhaust internal union remedies bars an employee's claim against his employer. In decisions in the Third,[3] Sixth[4] and Eighth[5] Circuits, the courts have dismissed cases against both the employer and the union where the plaintiff had failed to exhaust internal union remedies and had not offered an adequate explanation for his failure. By contrast, in three other Circuits—the Seventh,[6] Ninth,[7] and Tenth[8]—the courts have ruled that the defense of failure to exhaust internal union remedies is available to the employer only if those remedies permit reinstatement of the employee's grievance. Finally, still other cases have held that, contrary to the foregoing decisions, the defense of

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3. *See, e.g.*, **Dezura v. Firestone Tire & Rubber Co.**, 470 F. Supp. 121 (E. D. Pa. 1979), *aff'd mem.*, 612 F. 2d 571 (3d Cir. 1979); **Pawlak v. International Brotherhood of Teamsters**, 444 F. Supp. 807 (M. D. Pa. 1977), *aff'd mem.*, 571 F. 2d 572 (3d Cir. 1978); and **Aldridge v. Ludwig-Honold Mfg. Co.**, 385 F. Supp. 695 (E. D. Pa. 1974), *aff'd mem.*, 517 F. 2d 1397 (3d Cir.), *cert. denied*, 423 U. S. 937 (1975).

4. **Willetts v. Ford Motor Co.**, 583 F. 2d 852 (6th Cir. 1978); **Sherba v. Teamsters Local 400**, 101 LRRM 2582 (N. D. Ohio 1979). *But see* **Geddes v. Chrysler Corp.**, 608 F. 2d 261 (6th Cir. 1979).

5. **Rainey v. Missouri Utilities Co.**, 596 F. 2d 310 (8th Cir. 1979); **Neiger v. Sheet Metal Workers**, 470 F. Supp. 622 (W. D. Mo. 1979). *But see* **Petersen v. Rath Packing Co.**, 461 F. 2d 312 (8th Cir. 1972).

6. In addition to the decision below, *see* **Baldini v. Local Union No. 1095**, 581 F. 2d 145 (7th Cir. 1978), and **Harrison v. Chrysler Corp.**, 558 F. 2d 1273 (7th Cir. 1977).

7. **Clayton v. ITT Gilfillan**, 623 F. 2d 563 (9th Cir. 1980), *cert. granted*, 49 U. S. L. W. 3332 (Nov. 3, 1980) (No. 80-54).

8. **Varra v. Dillon Companies, Inc.**, 615 F. 2d 1315 (10th Cir. 1980). *Compare* **Fizer v. Safeway Stores, Inc.**, 586 F. 2d 182 (10th Cir. 1978).

failure to exhaust internal union remedies is never available to the employer.[9]

B. The Ruling of the Court Below Is Highly Unfair to Employers.

It is by now well established that an employee (like Tinsley here) whose grievance was not taken to arbitration cannot recover from his employer in a suit brought under Section 301 of the Labor Management Relations Act unless he first establishes that the union breached its duty of fair representation in refusing to arbitrate his grievance. In short, a discharged employee can prevail against his employer only if he proves both that he was discharged in violation of the contract *and* that the union's refusal to take his grievance to arbitration was "arbitrary, discriminatory or in bad faith." *See* **Vaca v. Sipes,** 386 U. S. 171, 190 (1967).

Under these circumstances, the ruling of the court below—which absolved only the Union of liability, even though its wrongdoing must be established in order for plaintiff to recover from the employer—is illogical and extremely unfair to the employer. First, exhaustion of internal union remedies might well establish that the union in fact did act properly. As one court stated:

> Furthermore, had plaintiff exhausted his internal union remedies, it might have been shown that the union did not breach its duty to plaintiff. Under these circumstances the direct action, permitted by *Vaca v. Sipes, supra,* against the employer (Eastern) would not lie.

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9. *See, e.g.,* **Geddes v. Chrysler Corp.,** *supra,* 608 F. 2d 261 (6th Cir. 1979); **Fizer v. Safeway Stores Inc.,** *supra,* 586 F. 2d 182 (10th Cir. 1978); **Winter v. Local Union No. 639,** 569 F. 2d 146 (D. C. Cir. 1977); **Petersen v. Rath Packing Co.,** *supra,* 461 F. 2d 312 (8th Cir. 1972).

Kobielnik v. International Brotherhood of Teamsters, 470 F. Supp. 125, 128 (E. D. Pa. 1979). Moreover, requiring an employer to present the union's defense to the claim of unfair representation places an unfair burden upon the employer. As another court reasoned:

> [I]t is simply unfair to expect the Employers to litigate and defend the Union against plaintiffs' claim of unfair representation. The Union has best access to the appropriate witnesses and evidence and should defend its own position.

Atwood v. Pacific Maritime Association, 432 F. Supp. 491, 495 (D. Ore. 1977); *see also* **Neal v. System Board of Adjustment,** 348 F. 2d 722, 727-28 (8th Cir. 1965).

Employers like UPS will be severely prejudiced if they are forced to defend the union's conduct as well as their own after the union has been dismissed from the case. How can an employer defend against a plaintiff's allegation that the union breached its duty of fair representation to him—an allegation which must be proven *before* the Court can consider the alleged breach of the contract—without union collaboration, which well may not be available if the union is not a party? Since an allegation of unfair representation requires a determination as to whether the action of the union was arbitrary, discriminatory, or in bad faith, only officials of the union are in a position to present a defense.

The potential prejudice to an employer like UPS is clear. After the union has been dismissed from the case, it may no longer have any interest in defending its conduct, since it cannot be held liable. It is much more likely at that point to cooperate with the plaintiff, who after all is a member of the union, and at best to put up only token opposition (if any) to the plaintiff's claim that he had

been represented unfairly. It is obviously prejudicial to an employer to make its liability depend in part on whether misconduct by the union can be established, but at the same time by dismissing the union from the case to remove any incentive the union would have to defend its own actions.

The prospect of conflicting decisions provides another reason why judgment should be entered in favor of the employer as well as the union when internal union remedies have not been exhausted. In the action against the employer, the court might find that the union breached its duty of fair representation, since the union would not be present to defend itself and would have no incentive to cooperate with the employer. If the plaintiff ultimately did exhaust his internal union remedies without success and commenced a new lawsuit against the union, the second court might find that the union had *not* breached its duty of fair representation. However, the employer already might have been found liable and ordered to make the plaintiff whole. The employer thus could not rely on the subsequent, more informed decision exonerating the union, even though the decision exonerating the union necessarily would have also exonerated the employer had the decision been rendered in the earlier lawsuit. Obviously, such a result would be totally unfair and contrary to the interests of justice.

The Court of Appeals' decision also suffers from faulty logic. In justifying its affirmance of the grant of summary judgment in favor of the Union, the Court of Appeals reasoned that the exhaustion requirement serves the purpose of "forestalling judicial intervention into internal union matters pending a full attempt at resolution by the union itself," stating:

> "The point of the exhaustion requirement is that a union should have a right to attempt to satisfy dis-

> gruntled members, *and a court should know just what the union did or did not do with respect to the complaint before trying to decide if fair representation really was denied and what relief would be just in the circumstances.*" (Emphasis added).

A5, quoting **Baldini v. Local 1095,** *supra,* 581 F. 2d at 149 (emphasis added). However, the Court of Appeals failed to recognize that the above reasoning is as applicable to a claim against an employer as it is to a claim against a union. Since proof of a union's breach of its duty of fair representation is an indispensable part of an employee's Section 301 claim against his employer, permitting his action to proceed against the employer prior to the exhaustion of internal union remedies would lead to the very evil with which the Court of Appeals was concerned—premature judicial intervention in internal union matters. Even in litigation over the claim against the employer alone, the court necessarily will be "trying to decide if fair representation really was denied" without the benefit of evaluating "what the union did or did not do with respect to the complaint."

Partly because of these factors, several courts have held that unions are indispensable parties within the meaning of **Fed. R. Civ. P.** 19 in Section 301 actions against employers. Some did so on the ground that full relief (such as reinstatement) might adversely affect the interests of other union members. *See, e.g.,* **Bradley v. Ford Motor Co.,** 417 F. Supp. 23, 25 (N. D. Ill. 1975); **Townsend v. Exxon Co.,** 420 F. Supp. 189, 190 n. 1 (D. Mass. 1976); **Kinnunen v. American Motors Corp.,** 56 F. R. D. 102 (E. D. Wis. 1972). Others reasoned that the Union's presence is necessary to assist in interpreting the collective bargaining agreement. *See, e.g.,* **Johnson v. Colts, Inc.,** 306 F. Supp. 1076, 1079 (D. Conn. 1969); **Kinnunen,** *supra.*

Atwood, *supra,* denied a motion to dismiss the union from the case primarily on the ground that it would be unfair to force the employer to defend the union, as it would have to do in a Section 301 suit if the union were no longer a party.

C. The Court of Appeals' Holding That the Failure to Exhaust Internal Union Remedies Is a Defense Available Only to the Union and Not to UPS Is Contrary to This Court's Decision in Vaca v. Sipes.

In **Vaca v. Sipes,** 386 U. S. 171 (1967), this Court stated that it would be improper to fashion a rule of law under which the remedy for a proven breach of the duty of fair representation would be assessed only against the employer. As this Court stated:

> If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. *What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer?*

Id. at 187 (emphasis added). The rule of law adopted by the court below was completely inconsistent with the above observation in **Vaca.** Although the court below recognized that the fault of the Union must be established before Tinsley can litigate his breach of contract claim against UPS, it held that the Union was properly dismissed from the case. In short, contrary to **Vaca,** it permitted the fashioning of a remedy "only with respect to the employer."

CONCLUSION

For all of the foregoing reasons, United Parcel Service, Inc., respectfully requests this Court to grant its petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, in order to decide the present case along with the appeal in **Clayton v. ITT Gilfillan.**

Respectfully submitted,

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Appendix.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-2445

PAUL E. TINSLEY,
Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC., and HIGHWAY DRIVERS, DOCKMEN, SPOTTERS, RAMPMEN, PACKING HOUSE AND ALLIED PRODUCTS DRIVERS AND HELPERS, OFFICE WORKERS AND MISCELLANEOUS EMPLOYEES, LOCAL UNION NO. 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants-Appellees.

Appeal From the United States District Court for the Southern District of Illinois, Alton Division.
No. 78-5141—J. Waldo Ackerman, *Judge.*

ARGUED SEPTEMBER 18, 1980—
DECIDED DECEMBER 12, 1980

Before PELL, BAUER and WOOD, *Circuit Judges.*

PELL, *Circuit Judge.* The plaintiff-appellant, Paul Tinsley, challenges the district court's grant of summary judgment in favor of United Parcel Service (UPS) and Highway Drivers, Dockmen, Spotters, Rampmen, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local 710, Inter-

national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union or Local 710). UPS discharged Tinsley from employment on October 20, 1977. Local 710 thereafter filed a grievance on the appellant's behalf pursuant to the terms of the collective bargaining agreement. The grievance proceeded without success to the UPS/Local 710 Joint Grievance Committee, the final step before arbitration. The Committee denied the grievance and advised Tinsley that he would not be reinstated. The Union declined to submit the grievance to binding arbitration.

Tinsley failed to invoke the Union's appeals process to contest the Union's failure to press his grievance to arbitration.[1] Instead, on August 4, 1978, the appellant instituted an action under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, alleging that UPS had violated the collective bargaining agreement by discharging Tinsley without just cause, and that Local 710 had breached its duty of fair representation. The district court granted summary judgment for the Union "due to Plaintiff's failure to initiate and exhaust his internal union remedies." Some six months later, the court granted summary

1. Thereafter, and prior to the filing of the present suit, Tinsley filed charges pursuant to the National Labor Relations Act, contending essentially, as he does in the present litigation, that he was discharged because of his activity on behalf of a labor organization. The reason given by the UPS for the "just cause" discharge was Tinsley's repeated failures to follow supervisory instructions. By letter of December 6, 1977, the NLRB Regional Director concluded, "The investigation failed to establish that the Employer terminated you or in other respects discriminated against you because of protected Union concerted activities, rather than, as contended by the Employer, that you were discharged for repeated failure to follow supervisory instructions. . . . I am, therefore, refusing to issue complaint in this matter."

The merits of the justness of the discharge were not reached by the district court and are not before us.

judgment for UPS on the basis of its motion "that the plaintiff's claim against the co-defendant union has been denied by this Court's allowance of the union's motion for summary judgment." This appeal followed.

I.

Exhaustion of internal union remedies is an indispensable prerequisite to suit against a union where union remedies are both mandatory and adequate. *Baldini v. Local 1095*, 581 F. 2d 145, 148 (7th Cir. 1978); *Newgent v. Modine Manufacturing Co.*, 495 F. 2d 919, 927 (7th Cir. 1974). Local 710's internal union remedies are both mandatory [2] and, by virtue of well-established, and controlling, authority are adequate. The internal appeals process offers injunctive relief [3] and monetary damages.[4]

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2. Article 22 of Local 710's Constitution and Bylaws provides:

> No member or officer of this Local Union shall resort to any court, tribunal or agency outside this Local Union or the International Union unless and until he has exercised all his rights as a member, and all forms of relief and avenues of appeal as provided by the International Constitution or these By-Laws have been exhausted by him, unless otherwise provided by statute.

3. Article XIX, Section 9 of the International Brotherhood of Teamsters' (I. B. T. or International) Constitution states:

> Decisions and penalties imposed upon individual members, officers, elected Business Agents, Local Unions, Joint Councils or other subordinate bodies found guilty of charges may consist of reprimands, fines, suspensions, expulsions, revocations, denial to hold any office permanently or for a fixed period, *or commands to do or perform, or refrain from doing or performing, specified acts.*

(Emphasis added.)

The I. B. T. Constitution is binding on members of Local 710 pursuant to Article 19, Section 4 of the Local's Constitution and Bylaws.

4. The I. B. T. Constitution, Article XIX, Section 9, establishes that fines may be assessed against individuals or against the Union

The fact that the Union's appeals procedure cannot provide job reinstatement[5] does not render the remedies inadequate because "relief against the *union* in a civil action could never produce reinstatement." *Baldini, supra,* 581 F. 2d at 149 (emphasis in original). Numerous courts have found the identical Teamsters' remedies to be adequate in breach of fair representation cases where the union asserted the defense of nonexhaustion. *See, e.g., Winter v. Local 639,* 569 F. 2d 146, 149 (D. C. Cir. 1977); *Fabian v. Freight Drivers and Helpers Local No. 557,* 448 F. Supp. 835, 839 (D. Md. 1978). Indeed, in its brief here, the Union cites a page and a half of cases supportive of the above proposition, substantially all of which, however, are district court cases, many of which are not in the Federal Supplement reporter.

The exhaustion requirement springs from the union member's previously noted contractual obligation to exhaust union remedies before resorting to legal redress. *Harrison v. Chrysler Corp.,* 558 F. 2d 1273, 1278 (7th Cir.

4. (Cont'd.)

itself. The Union in its brief cites an unreported district court case taking the view that the provision for fines could have been used to make the plaintiff whole. We have some difficulty in envisioning that an International Union fine of local officers would not go into the coffers of the Union rather than to the victim. No doubt the possibility of fines if these were to occur with any regularity in the cases of failure to represent would produce a compulsion to see through any cases having reasonable merit. In any event, the Union also relies upon the "command" provisions quoted in note 3 as a source of "make whole" money. We don't know whether in practice this will occur, but like the fabled mountain, it is there.

5. At the grievance stage, Tinsley apparently sought reinstatement. In the present action, although including in his complaint the boilerplate "such other and further relief as may be appropriate," he specifically seeks only to recover monetary damages, both compensatory and punitive.

1977); *Newgent v. Modine Manufacturing Co., supra,* 495 F. 2d at 927-28; *Orphan v. Furnco Construction Corp.,* 466 F. 2d 795, 800 (7th Cir. 1972). Exhaustion serves the further purpose of forestalling judicial interference into internal union matters pending a full attempt at resolution by the union itself. As this court noted in *Baldini v. Local 1095, supra,* 581 F. 2d at 149:

> The point of the exhaustion requirement is that a union should have a right to attempt to satisfy disgruntled members, and a court should know just what the union did or did not do with respect to the complaint before trying to decide if fair representation really was denied and what relief would be just in the circumstances .

See also Harrison v. Chrysler Corp., supra, 558 F. 2d at 1278.

Exhaustion is excused where resort to union remedies would be futile. The appellant argues that because the Union issued a voluntary withdrawal card to him, he was no longer a member, and therefore was unable to invoke the Union appeals process. This contention, however, falls short of the "clear and positive showing of futility" required to excuse a plaintiff from exhausting union remedies. *Winter v. Local 639, supra,* 569 F. 2d at 149.

The Joint Committee denied Tinsley's grievance and reinstatement request shortly before or after the appellant had obtained his withdrawal card.[6] Tinsley never attempted to initiate a complaint under the Union appellate process. Instead, he asserts that because he was no longer

6. The Joint Committee announced its decision on November 4, 1977. The exact date that the withdrawal card was issued is uncertain. The plaintiff asserts that it was issued sometime in November, 1977, possibly as early as November 2.

a full Union member after the Joint Committee's decision was issued, he was by definition, excluded from bringing charges by Article XIX of the International's Constitution. That provision allows any "member" to file charges against another member, a suspended member, or an ex-member who has been issued a withdrawal card. Tinsley contends that the distinction drawn between "members" and ex-members who have been issued withdrawal cards justifies the inference that members who have withdrawn can never utilize the Union appeals process.

Even if Tinsley retained no accrued right of access to the appellate procedures by virtue of his full membership status at the time of his discharge and grievance processing,[7] he still has not shown that the Union appellate procedure is closed to ex-members possessing withdrawal cards. Tinsley's argument ignores the purpose served by withdrawal from Union membership. Voluntary withdrawal relieves an unemployed Union member from the burden of paying dues and avoids a subsequent initiation fee if the person later resumes active membership. It does not wholly extinguish all rights and duties of membership.[8]

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7. This case was heard by a magistrate pursuant to 28 U. S. C. § 636. The district court approved, and ruled in accordance with, the magistrate's proposed findings. The magistrate did not believe that Tinsley's current membership status was relevant. Rather, he reasoned that because Tinsley was a full member at the time of the events leading up to his discharge and the processing of his grievance, "a subsequent 'withdrawal from the contract' does not lessen one's rights and obligations which accrued at a time when the contract was fully in effect."

8. Article XVIII, Section 5(b) of the International Constitution provides in part:

> In any case where a Local Union is required to give a member an honorable withdrawal card . . . it may provide for the continuance of Local Union benefits to such member or former member under conditions which it may set forth, but such

Because the Union is bound to issue a voluntary withdrawal card at an unemployed member's request,[9] acceptance of the appellant's argument would seriously undermine the exhaustion requirement. Any unemployed member who sought to bring a § 301 suit could circumvent the exhaustion requirement at will by simply obtaining a voluntary withdrawal card.[10] Whether it would be rested on estoppel, bad faith, or public policy, we would have little trouble in rejecting such a circumvention.

II.

The circuits are split over whether or not the exhaustion defense is also available to the employer.[11] An exhaustion requirement in favor of an employer clearly is not mandated by contract as it is with respect to a union. *Harrison v. Chrysler Corp., supra,* 558 F. 2d at 1278;

8. (Cont'd.)

member or former member shall not be permitted to hold office or vote, and shall have only such right to participate in the meetings and the affairs of the Local Union as shall be uniformly permitted by the Local Union Executive Board.

9. Article XVIII, Section 5(a) of the International Constitution provides, in part, that "[w]hen a member becomes unemployed in the jurisdiction of the Local Union, he shall be issued an honorable withdrawal card upon his request."

10. This case is unlike *Segarra v. Sea-Land Service, Inc.,* 581 F. 2d 291 (1st Cir. 1978), where the court refused to apply the exhaustion defense in favor of the union because the plaintiff had been expelled from the union four years before the occurrence of the incidents at issue.

11. Some circuits without any particular analysis dismiss the employer as a party once the union is dismissed due to the plaintiff's failure to exhaust internal union remedies. *See, e.g., Willetts v. Ford Motor Co.,* 583 F. 2d 852 (6th Cir. 1978); *Pawlak v. Local 764,* 444 F. Supp. 807 (M. D. Pa. 1977), *aff'd,* 571 F. 2d 572 (3d Cir. 1978).

Orphan v. Furnco Construction Co., supra, 466 F. 2d at 800. Nor does the policy of nonintervention in union affairs implicate any interest of the employer. *Harrison v. Chrysler Corp., supra,* 558 F. 2d at 1278.

This circuit has imposed a qualified exhaustion requirement, however, in suits against the employer in order to serve national labor policy favoring private resolution of employment disputes. In *Harrison v. Chrysler Corp., supra,* 558 F. 2d at 1278, this court ruled that "such an obligation is implied under a collective bargaining agreement which . . . reposes in the union exclusive authority to represent the employee in contractual claims against the employer and which provides grievance machinery as the exclusive method of resolving those claims." [12]

Before an employer can prevail by using the exhaustion defense, *Harrison* requires that the defendant prove "that an intraunion appeal could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement." *Id.* at 1279. If the union's reversal of a prior wrongful decision could revive the employee's stalled grievance, then the union could informally rectify the very wrong of which the plaintiff complains—a breach of the duty of fair representation. If this occurred, the plaintiff would no longer

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12. Article 23 of the collective bargaining agreement between UPS and Local 710 provides that only Union representatives may invoke grievance procedures. This requirement is typical of most collective bargaining agreements. *Clayton v. ITT Gilfillan,* 623 F. 2d 563, 567 (9th Cir. 1980), *cert. granted,* — U. S. —, (November 3, 1980).

Resort to the contractual grievance procedure is presumed to be the exclusive remedy unless the parties to the collective bargaining contract have explicitly provided otherwise. *Republic Steel Corp. v. Maddox,* 379 U. S. 650, 657-58 (1965).

be able to maintain a breach of contract suit against the employer under *Vaca v. Sipes,* 386 U. S. 171 (1967), because there would have been no breach of the duty of fair representation. Consequently, UPS cannot in this Circuit prevail in the instant case unless resort to the Union appeals process could have revived Tinsley's grievance.

The recent case of *Miller v. Gateway Transportation Co.,* 616 F. 2d 272 (7th Cir. 1980), is dispositive. In *Miller,* this court was faced with the question of whether or not an employer can assert the defense of failure to exhaust the very internal union remedies at issue here: those of Teamsters Local 710. In *Miller,* as in the instant case, the Joint Committee had denied the plaintiff's grievance and refused reinstatement. This court recognized that decisions of the Joint Committee are final and binding according to the collective bargaining agreement.[13] The court analyzed the remedies available and concluded that the finality of the Joint Committee's determination precluded reinstatement of the employee's claim. *Id.* at 275.

The rationale favoring union grievance procedure exhaustion in suits against employers is grounded upon the assumption that the private remedies available will afford the same relief which an employee could obtain judicially. *Clayton v. ITT Gilfillan,* 623 F. 2d 563, 569 (9th Cir. 1980), *cert. granted,* — U. S. — (November 3, 1980). As *Miller* acknowledged, Local 710 itself is powerless to award Tinsley reinstatement. Moreover, this court has rejected as frivolous the defendant's contention that an

13. Article 23 of the collective bargaining agreement stipulates that "[i]n the event of a grievance on the part of any Employee, . . .a decision reached at any stage will be final and binding on both parties."

employer might, at the union's request gratuitously reopen grievance proceedings deemed "final and binding" pursuant to the collective bargaining contract to reconsider the reinstatement request and thereby expose itself to the very liability it is seeking to avoid in this action. *Miller v. Gateway Transportation Co., supra,* 616 F. 2d at 275 n. 5; *Harrison v. Chrysler Corp., supra,* 558 F. 2d at 1279. *See also Baldini v. Local 1095, supra,* 581 F. 2d at 150. In *Miller v. Gateway Transportation Co., supra,* 616 F. 2d at 275 (footnotes omitted), this court reasoned that

> [t]he union remedies at issue provide for "trials" of union members, officers, local unions, and other subordinate bodies of the International. Such a trial may be initiated by a union member's complaint alleging a violation of the union constitution or by-laws and may result in "reprimands, fines, suspensions, expulsions, revocations" and other similar relief. That relief does not, of course, include the setting aside of an adverse decision rendered pursuant to the terms of a collective bargaining agreement by a union-employer grievance committee; neither does it include any other relief to which Miller may be entitled from Gateway.

Because the Union cannot reinstate Tinsley nor revive his grievance, the remedies are inadequate to bar suit against UPS. *See, e.g., Miller v. Gateway Transportation Co., supra,* 616 F. 2d at 275; *Harrison v. Chrysler Corp., supra,* 558 F. 2d at 1279 (union remedies are inadequate to bar suit against employer because they cannot provide back pay for which the defendant may be liable); *Clayton v. ITT Gilfillan, supra,* 623 F. 2d at 569 (absence of reinstatement as remedy bars exhaustion defense as applied to employer).

Nonetheless, UPS contends that once the Union is dismissed as a party, the employer also should be dismissed because a court cannot properly determine the fair representation issue without the presence of the Union as a party.[14] UPS argues that reversing the summary judgment in its favor, but upholding Local 710's dismissal, would impose an unfair burden upon the employer because it alone would have to defend the Union's actions. The defendant urges that it may not be able to obtain Union officials as witnesses. Once the Union is dismissed as a party, it may no longer be interested in defending its prior actions, but might wish to assist the plaintiff in obtaining a judgment against UPS. Moreover, UPS contends, allowing suit against an employer in these circumstances will give plaintiffs an incentive to circumvent union remedies because they will know that the union will be eliminated as a party and the employer, forced to defend the action alone, will necessarily be less able than the union to vindicate the union's prior actions.

This circuit has not explicitly addressed the fundamental fairness argument to date. The Ninth Circuit, however, in *Clayton v. ITT Gilfillan, supra,* 623 F. 2d at 570, has recognized that "[c]onditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly." The Court reasoned, nevertheless that this result is mandated

14. UPS argues that refusing to dismiss the employer as a party in these circumstances will not only hinder a just resolution of the claim against the employer, but also raises the prospect of potential conflicting decisions. A court may rule, for example, that the employer is liable because it finds that the union did breach its fair representation duty. Subsequently, the plaintiff may exhaust the union remedies available, and then commence a new lawsuit against the union in which it would be possible to find no breach of the duty of fair representation.

by the case law and by the very principles of *Vaca v. Sipes, supra,* in which the Supreme Court ruled that an employer could not escape a breach of contract suit if the union had wrongfully refused to process the employee's grievance even though the employer may have done nothing to prevent exhaustion of remedies. Judge Goodwin writing for the court in *Clayton* reasoned that precluding suit against the employer in cases where a plaintiff failed to exhaust all internal remedies would undermine *Vaca* and other cases that have conditioned insulation from suit (which the employer enjoys by virtue of the exclusivity of remedies stipulated in the collective bargaining agreement) on the union's discharge of its duty of fair representation. The court acknowledged that it was "aware of the anomaly. But we have not been directed to any authority that would permit the employer to escape liability if the trier eventually finds that the employee did not receive the minimum representation his union owed him. On the contrary, the cases compel the result we reach." *Id.* at 570.

In any event, the thrust of UPS's argument of unfairness focusses only on the potential difficulties of the company, unaided by a union which no longer has the interest of a co-defendant, in showing that the union did provide the minimum representation it owed the employee. Even if this cannot be demonstrated, there is no automatic liability on the company. The plaintiff must still demonstrate that the company breached the contract when it discharged him, *i.e.*, that his discharge was without just cause. Even as to the first prong, before there could be liability, the plaintiff, having brought the action, would have the burden of proving the lack of adequate representation by the union as a part of his case. *Vaca v. Sipes, supra,* 386 U. S. at 186.

Having concluded under the case law of this Circuit that the judgment in favor of the Union must be affirmed and the judgment against UPS must be reversed, we also express the thought that amendatory legislation might be appropriate in the present type of situation, which the number of cases filed indicates is not infrequent. While the particular Union has appellate procedures to which an employee must resort before it can be said that he has exhausted his internal union remedies, these, on any fair analysis, are collateral to the dispute in question, undoubtedly would require substantial periods of time for pursuit, and, in all probability, would not be successful as they are before an internal and possibly non-objective forum. Disputes such as this should be, for the most part, resolved expeditiously at the site of the occurrence. On the other hand, because the exclusive bargaining agent of the employee has chosen not to proceed to take all direct steps to resolve this issue, a fairness argument would permit the employer to rely upon the discontinuance. This reliance, of course, could not be justified if collusion existed between the company and the union.

For the reasons stated herein, the judgment of the district court is affirmed as to the Union and reversed as to UPS.[15] Plaintiff will recover one-half of his costs against UPS and bear the remainder. The Union will recover its costs against the plaintiff.

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15. We are not unmindful that subsequent to oral argument, and while this opinion was in the process of preparation, the Supreme Court granted certiorari in *Clayton v. ITT Gilfillan*. As noted in the foregoing opinion, a conflict among the circuits does exist, a basis for the grant of certiorari. While we remain sympathetic to the position of UPS, we decline to defer our decision in the present appeal, being of the opinion that the result we have reached is the correct one under existing law.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

No. 78-5141

MAGISTRATE CHARLES H. EVANS

PAUL E. TINSLEY, JR.,

Plaintiff,

v.

HIGHWAY DRIVERS, DOCKMEN, SPOTTERS, RAMPMEN, PACKING HOUSE AND ALLIED PRODUCTS DRIVERS AND HELPERS, OFFICE WORKERS AND MISCELLANEOUS EMPLOYEES, LOCAL UNION NO. 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Defendant.

RECOMMENDED ORDER

I. BACKGROUND

This is a case arising under Section 301 of the Taft-Hartley Act, 29 U. S. C. Sec. 185, alleging that Plaintiff was discharged in violation of the terms of the collective bargaining agreement between Defendants United Parcel Service, Inc. (the "Company") and Highway Drivers,

Dockmen, Spotters, Rampmen, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Local 710). Aside from alleging that the Company's termination of Plaintiff was in violation of the collective bargaining agreement, Plaintiff alleges that Local 710 breached the duty of fair representation. The matter currently before the Court is Local 710's Motion to Dismiss and/or for Summary Judgment.

II. FACTS

The Complaint alleges, and for the purpose of this Motion must be accepted as true, that Defendants were parties to a collective bargaining agreement. Plaintiff, as an employee of the Company, was covered by the terms of the agreement and was a member of Local 710. On October 20, 1977, Plaintiff was discharged from employment. The notice of discharge given by the Company to Plaintiff stated that Plaintiff failed to follow supervisory instructions. Plaintiff protested his discharge to the Local 710 union steward. A grievance was filed by Local 710 on Plaintiff's behalf. The grievance was carried to the United Parcel Service 710 Grievance Committee, the final step before arbitration, without settlement. On November 4, 1977, Plaintiff was advised that his grievance had been denied by the joint grievance committee and that he would not be reinstated to his job. Plaintiff further alleges that he has made repeated requests to Defendant Local 710 that his grievance be presented to an independent arbitrator as provided for under the collective bargaining agreement, but that his grievance has never been submitted to an arbitrator.

III. DISCUSSION

A. Plaintiff's Failure to Exhaust Internal Union Remedies

The first basis for Local 710's Motion is that Plaintiff failed to exhaust his internal union remedies found in Local 710's Constitution and Bylaws, and in the Constitution of the International Brotherhood of Teamsters (the "International"). Plaintiff concedes that he did not initiate or attempt exhaustion of those remedies.

The Landrum-Griffin Act, 29 U. S. C. § 411(a)(4) (1970) specifically permits a union to require its members to exhaust internal union remedies before suing the union. This Circuit stated in *Newgent v. Modine Manufacturing Company*, 495 F. 2d 919, 927 (7th Cir., 1974) that where the internal union remedies are mandatory and adequate "it is well settled that an exhaustion of the remedies is an indispensable prerequisite to the institution of a civil action against a union." This position was recently reiterated in *Baldini v. Local Union No. 1095, UAW*, 581 F. 2d 145 (7th Cir., 1978).

There is no question in this case that the internal union remedies of the Teamsters Union are mandatory. In fact, Plaintiff readily concedes this point. Article 22 of Local 710's Constitution and Bylaws states:

> No member or officer of this Local Union shall resort to any court, tribunal or agency outside the Local Union or the International Union unless and until he has exercised all his rights as a member, and all forms of relief and avenues of appeal as provided by the International Constitution or these By-Laws have been exhausted by him, unless otherwise provided by statute.

Similarly, there is no question in this case that the internal union remedies of the Teamsters Union are adequate. Again, Plaintiff concedes this point. Article 21 of Local 710's Constitution and Bylaws provides for a hearing before the Local Union Executive Board concerning charges filed by a member. Further appeals to the International are provided. Article XIX of the International Constitution provides that if the aggrieved member loses at the Local Union Executive Board, he may appeal to the International Executive Board. The International Constitution provides the Executive Board with several options. It may issue a reprimand, impose fines, suspensions or expulsions, or command a union official "to do or perform or refrain from doing or performing specified acts." In certain circumstances under Article VI § 2(a), appeals may be taken to the International President.

Judicial acceptance of the adequacy of these exact internal union remedies of the Teamsters Union is widespread, and similar motions as filed by Local 710 herein have been granted due to a plaintiff's failure to exhaust those remedies. *Winter v. Local 639,* I. B. T., 569 F. 2d 146 (D. C. Cir., 1977); *Fabian v. Freight Drivers, Local 557,* 448 F. Supp. 835 (D. C. Md., 1978) and cases cited therein; *Pawlak v. Teamsters, Local 764,* 444 F. Supp. 807 (M. D. Pa., 1977); *Csandi v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, No. 773,* 99 LRRM 2945 (E. D. Pa., 1978); *McGovern v. I. B. T. Local No. 773,* 85 LC ¶ 11,035 (E. D. Pa., 1978). Numerous cases in this Circuit and one of this very Court have similarly so held. *Roundtree v. United Parcel Service, Inc. and Local 710 I. B. T.,* No. 78-3040 (S. D. Ill., 1978); *Canada v. United Parcel Service, Inc. and Local 710 I. B. T.,* No. 77 C 20033 (N. D. Ill., 1978); *Essex v. United Parcel Service and Teamsters Union, Local 710,* Civil No. F 76-143 (N. D. Ind., 1979); *Miller v. Gateway Transportation Co. Inc.*

and I. B. T. Local No. 710, 77 C 2443 (N. D. Ill., 1978); *Deanes v. United Parcel Service Inc.*, 78 C 1963 (N. D. Ill., 1979); *Marek v. Lake Shore Transfer and Teamsters General Local No. 200*, 77-C-748 (E. D. Wisc., 1978); *Heard and Reba v. General Drivers, Warehousemen and Helpers Union, Local 142, I. B. of T. and Artim Transportation Corporation*, Civil No. H 77-367 (N. D. Ind., 1979); *Peterson v. Pepsi-Cola Bottling Co. et al.*, No. 78 C 569 (N. D. Ill., 1979).[1]

Notwithstanding the foregoing, Plaintiff asserts that he should be excused from the exhaustion requirement since, as stated in his affidavit supplied to the Court, "[s]ometime in November, 1977, I applied for and received a withdrawal card from Teamsters Local 710."[2] For the following reasons such an assertion is insufficient to excuse Plaintiff from exhausting the internal union remedies of the Teamsters.

First, Plaintiff asserts that since he received a withdrawal card from Local 710, he allegedly was no longer a member. Plaintiff thus argues that it would have been futile for him to exhaust the internal union remedies since those remedies are available for members only.

The courts require a "clear and positive showing of futility" to justify a plaintiff's failure to exhaust internal union remedies prior to bringing a civil suit against a union. *Winter v. Local 639 I. B. T., supra*, 569 F. 2d at

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1. It is noted that *Roundtree, Canada, Essex, Miller, supra* involve this very defendant, Local 710 I. B. T.

2. During oral argument on this Motion, Plaintiff's counsel represented that the date the withdrawal card was issued was on or about November 2, 1977 which was before Plaintiff was advised by the joint committee that his discharge was upheld. For the reasons set forth below, whether he received his withdrawal card before or after being advised of the committee's decision would not require a different result on this Motion.

149; *Roundtree v. United Parcel Service Inc. and Local 710 I. B. T., supra.* No "clear and positive" showing of futility is made in this case by the mere assertion that Plaintiff received a withdrawal card. Article XVIII, Section 5 of the International Constitution states

* * *

> (a) [w]hen a member becomes unemployed [such as Plaintiff in this case] in the jurisdiction of the Local Union he shall be issued an honorable withdrawal card . . . .
>
> * * *
>
> (b) * * *
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> In any case where a Local Union is required to give to a member an honorable withdrawal card . . . it may provide for the continuance of Local Union benefits to such member or former member under conditions which it may set forth, but such member or former member shall not be permitted to hold office or vote, and shall have only such right to participate in the meetings and the affairs of the Local Union as shall be uniformly permitted by the Local Union Executive Board.

Article 19, Section 3 of the Local 710 Constitution and Bylaws similarly states that when a member takes a withdrawal card, Local Union benefits may be continued and a member on a withdrawal card may have the right to participate in the meetings and affairs of the Local Union.

Thus, on the basis of the above quoted sections of the International's Constitution and Local 710's Constitution and Bylaws, it cannot be said by a "clear and positive showing" that all membership ties and obligations ceased

when Plaintiff received his withdrawal card, thus, making exhaustion of the internal union remedies futile. On the contrary, the ties and obligations of membership still exist for a member on a withdrawal card, although perhaps in a lesser degree than a member who is not on a withdrawal card. The member on a withdrawal card may enjoy Local Union benefits and the right to participate in meetings and the affairs of the Local Union. There is no "clear and positive showing" by Plaintiff that these benefits and other rights do not include the ability to invoke the internal union remedies of the Teamsters.[3] Nor is there any "clear and positive showing" that either Local 710 or the International Union would have refused to take Plaintiff's internal union charge on the basis that Plaintiff was on a withdrawal card for the simple reason that Plaintiff admits that he never sought to invoke the internal union process. As stated in *McKeon v. Highway Truck Drivers and Helpers Local 107, I .B. T.*, 223 F. Supp. 341, 345 (D. Del., 1963).

> Plaintiffs' allegation that exhaustion of union procedures would be futile is not sufficient to grant judicial relief; futility must be shown by *actual* resort to such procedures. [Emphasis supplied.]

Thus, Plaintiff has made no showing of futility to warrant excusal from exhaustion.

Second, even if Plaintiff's argument was not considered in terms of futility, but examined on the basis of

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3. This conclusion is further buttressed by the separate manner in which Local 710 treats a member who is expelled or suspended from membership as opposed to one who is merely on a withdrawal card. Under Article 19, Section 2 of the Local 710 Constitution and Bylaws, a member who has been suspended "shall not be entitled to *any* rights or privileges as a member of the Local or International Union." [Emphasis supplied.]

contractual obligations, he still cannot be excused from exhaustion. Indeed, in *Harrison v. Chrysler Corp.*, 558 F. 2d 1273, 1277-78 (7th Cir., 1977) the Seventh Circuit stated

> The exhaustion requirement is based primarily on a contractual obligation to exhaust internal union remedies, assumed by the member upon his joining the union and embodied in the union's constitution and regulations.

Accord, *Newgent v. Modine Manufacturing Company, supra,* 495 F. 2d at 927-28.

Thus, as discussed above, because it has not been clearly demonstrated that all obligations and rights of membership have ceased due to Plaintiff's taking a withdrawal card, the rationale of requiring exhaustion due to Plaintiff's contractual relationship with the Union via the Constitutions and Bylaws remains sound. But there are further reasons for requiring exhaustion even when analyzing Plaintiff's argument. It is readily conceded by Plaintiff that his discharge and the events leading up to his grievance processing by Local 710 all occurred at a time when Plaintiff was a full member of the Union and prior to his receiving a withdrawal card. Since these events occurred when Plaintiff was a full member, he was obviously contractually bound at that time by the Constitutions and Bylaws which required exhaustion of internal union remedies. It is even more compelling to require Plaintiff to exhaust his internal union remedies in this case since because the rights and obligations were full at the time of the incidents alleged, a subsequent "withdrawal from the contract" does not lessen one's rights and obligations which accrued at a time when the contract was fully in effect.

Indeed, an individual on a withdrawal card seeking to assert rights which accrued under a union constitution or bylaw provision while a full member would have a strong argument to assert those rights notwithstanding the possession of a withdrawal card.

Finally, the most compelling reason for rejecting Plaintiff's argument that he need not exhaust internal union remedies since he was on a withdrawal card is found in further examination of the rationale for the rule requiring exhaustion. The exhaustion defense is available to a union because of considerations unrelated to the question of whether it has perpetrated a wrong in the handling of a grievance by a member under a collective bargaining agreement. As stated by this Circuit in *Baldini v. Local Union No. 1095, UAW, supra,* 581 F. 2d at 149.

> The point of the exhaustion requirement is that a union should have the right to attempt to satisfy disgruntled members, and a court should know just what the union did or did not do with respect to the complaint before trying to decide if fair representation really was denied and what relief would be just in the circumstances.

By permitting Plaintiff to be excused from exhaustion in this case certainly precludes an examination by the Court of what further efforts and steps the Defendant Local 710 and its International would have taken to satisfy Plaintiff's charge that he was not treated properly as a member. Permitting excusal from exhaustion in this case thus frustrates one of the underlying policies of the exhaustion requirement, i.e., to allow a union "to attempt to satisfy disgruntled members" so that the Court can "know just what the union did or did not do with respect to the complaint before trying to decide if fair representation

was denied and what relief would be just in the circumstances." *Baldini, Id.*[4]

Plaintiff's reliance on *Segarra v. Sea-Land Service, Inc.*, 581 F. 2d 291 (1st Cir., 1978) is misplaced. In *Segarra*, the plaintiff therein was *expelled* from union membership in 1964 and the events surrounding his lawsuit occurred in 1968. *Id.* at 293. *Segarra* is readily distinguishable from the instant matter since the Plaintiff herein was a full member at the time the incidents surrounding this lawsuit arose; Plaintiff was not expelled, but merely had taken a withdrawal card; and the Defendant Local 710 gives members on withdrawal the ability to maintain rights and obligations within the union, whereas members who are expelled or suspended have no membership rights. Constitution and Bylaws, Article 19, Section 2.[5]

Therefore, having failed to initiate or exhaust the internal union remedies of the Teamsters Union, Plaintiff cannot proceed in this forum since exhaustion thereof is an indispensable prerequisite to this suit. *Newgent, supra; Baldini, supra.* Judgment should, therefore, be entered for Local 710. Moreover, Plaintiff's Complaint is fatally deficient because he failed to allege exhaustion of internal union remedies. *Fabian v. Freight Drivers Local 657,*

4. Plaintiff's argument, taken to its logical extent, shows an utter frustration of the policy of allowing a union to satisfy a disgruntled member prior to judicial intervention. In all cases where an employee claims a discharge was in violation of a collective bargaining agreement and further claims that the union breached its duty of fair representation, under Plaintiff's argument, all the member has to do is simply obtain a withdrawal card from the union in order to be excused from the exhaustion requirement. Withdrawal cards from the Teamsters Union are easily obtained upon the unemployment of a member. By permitting the exhaustion requirement to be so easily defeated in such a manner makes the exhaustion doctrine a nullity.

5. See fn. 3, *supra.*

supra, 448 F. Supp. at 839; *Roundtree v. United Parcel Service, Inc. and Local Union No. 710 I. B. T., supra.*

B. Other Grounds Advanced by Local 710

Local 710 also contends that judgment should be entered on its behalf, because, as a matter of law, the allegations of the Complaint are conclusionary and insufficient; acts constituting mere negligence by a union do not breach the duty of fair representation; and allegations by a plaintiff that the union would not take his grievance to an arbitrator do not state a breach of the duty of fair representation. The legal propositions stated by Local 710 are correct. In this Circuit, mere conclusionary allegations that the union breached the duty of fair representation are insufficient. *Williams v. General Foods Corp.*, 492 F. 2d 399, 405 (7th Cir., 1974); *Slagley v. Illinois Central Railroad Co.*, 397 F. 2d 546 (7th Cir., 1968). Similarly, in this Circuit, alleged negligence by a union in processing a grievance does not amount to a breach of the duty of fair representation. *Cannon v. Consolidated Freightways Corp.*, 524 F. 2d 290, 294 (7th Cir., 1975). See also *Bazarte v. United Transportation Union*, 429 F. 2d 868, 872 (3d Cir., 1970). Finally, it is well established that an employee does not have an unqualified right to have his grievance appealed all the way to the final step of a grievance procedure that involves final and binding arbitration by a neutral third party. *Vaca v. Sipes*, 386 U. S. 171, 191 (1967); *Stanley v. General Foods Corporation, Maxwell House Division*, 508 F. 2d 274, 275 (5th Cir., 1975); *Turner Air Transportation Dispatchers Association*, 468 F. 2d 297, 300 (5th Cir., 1972); *Moore v. Sunbeam Corp.*, 459 F. 2d 811, 820 (7th Cir., 1972); *Bazarte v. United Transportation Union, supra*, 429 F. 2d at 872. However, upon a reading of the Complaint in this case, it appears that Plaintiff has alleged sufficient facts to go

beyond mere conclusions. The Complaint further does not allege only negligence by Local 710 and only the failure to proceed to arbitration on Plaintiff's behalf, but incorporates other matters as well. Therefore, it seems that Local 710's Motion on the above stated grounds cannot be sustained.

IV. CONCLUSION

It is, therefore, recommended that Summary Judgment be granted on behalf of Local 710 due to Plaintiff's failure to initiate and exhaust his internal union remedies. It is further recommended that Local 710's Motion be denied on the other asserted grounds.

Dated this 10th day of April, 1979.

CHARLES H. EVANS
United States Magistrate

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

78-5141

PAUL E. TINSLEY, Jr.,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC., etal.,

Defendants.

ORDER

Under the provisions of 28 U. S. C. § 636(b)(1)(C), the United States Magistrate for this District Charles H. Evans has prepared proposed findings and recommendations and filed them with the Court on April 10, 1979 as well as mailing such findings and recommendations to the parties.

No specific objections having been received within the time limit set out in that statute, the Court has made an independent review of the file and the proposed findings and recommendations submitted by the Magistrate.

I find that the proposed findings are correct in all respects and that the recommendation submitted by the Magistrate is appropriate.

It is therefore ordered that summary judgment is granted on behalf of Local 710 due to Plaintiff's failure

to initiate and exhaust his internal union remedies. Local 710's motion is denied on the other asserted grounds.

Enter this 16th day of May, 1979.

/s/ J. WALDO ACKERMAN
J. Waldo Ackerman
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

78-5141

PAUL E. TINSLEY, JR.,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

ORDER

Currently before this Court is the Motion of Defendant United Parcel Service, Inc., to dismiss this action or in the alternative for summary judgment. The thrust of the motion relates to the fact that the plaintiff's claim against the co-defendant union has been denied by this Court's allowance of the union's motion for summary judgment. This denial was premised upon the defendant's failure to exhaust his intraunion remedies.

Having considered the matters here presented, I conclude that the defendant company's motion for summary judgment is well taken and must be allowed. So ordered.

Enter this 19th day of November, 1979.

/s/ J. WALDO ACKERMAN
J. Waldo Ackerman
United States District Judge

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 12, 1980

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

No. 79-2445

PAUL E. TINSLEY, JR.,
Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC., and HIGHWAY DRIVERS, DOCKMEN, SPOTTERS, RAMPMEN, PACKING HOUSE AND ALLIED PRODUCTS DRIVERS AND HELPERS, OFFICE WORKERS AND MISCELLANEOUS EMPLOYEES LOCAL UNION NO. 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Alton Division.

No. 78-C-5141

J. Waldo Ackerman, Judge

This cause was heard on the record from the United States District Court for the Southern District of Illinois, Alton Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED as to the Union and REVERSED as to UPS. Plaintiff will recover one-half of his costs against UPS and bear the remainder. The Union will recover its costs against the plaintiff.

The above is in accordance with the opinion of this Court filed this date.

No. 80-1550

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IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

PAUL E. TINSLEY, JR.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, United Parcel Service, Inc. (UPS), files this supplemental brief under Rule 22.6 of the Supreme Court Rules to address the relevance of this Court's recent decision in **Clayton v. United Auto Workers and ITT Gilfillan,** 49 U. S. L. W. 4550 (May 26, 1981) (Nos. 80-54 and 80-5049) to the instant petition for a writ of certiorari.

In **Clayton,** this Court ruled that the failure of an employee to exhaust internal union remedies does not bar his Section 301 action against either his employer or his labor union, unless those remedies can result in either complete relief to the employee or reactivation of his grievance.

The petition for a writ of certiorari in the instant case seeks review and reversal of a decision of the Court of Appeals for the Seventh Circuit which had affirmed the dismissal of the plaintiff's complaint against the Union, but had reversed the dismissal of the complaint against UPS, where the plaintiff had failed to exhaust internal union remedies. It was UPS's position that it is anomalous, illogical and highly prejudicial to an employer to permit this initially joint Section 301 action against union and employer to proceed against employer alone, particularly where (as here) proof that the union had breached its duty of fair representation was essential to a finding of employer liability. Because the issue raised by UPS was identical to the issue raised by ITT Gilfillan in its petition for a writ of certiorari in **Clayton** (No. 80-54), UPS suggested to this Court that its petiiton should be decided along with the appeal in **Clayton.**

Contrary to UPS's earlier expectation, however, the mechanical application of this Court's decision in **Clayton** does not provide an answer to the question posed in the instant case. The final and crucial question presented in

both the employer's petition in **Clayton** and UPS's petition here was whether "an employee who chooses not to exhaust internal union procedures [may] proceed solely against the Company and require the Company to present the Union's defense to the alleged breach of the duty of fair representation." In **Clayton**, the employee cross-petitioned for certiorari, and the Court granted both petitions. By contrast, in the instant case, the employee in this case has abandoned his effort to obtain redress from the union whose breach of the duty of fair representation he claims permits him to bring this action and is proceeding only against petitioner UPS. As a result, UPS will be forced to defend not only its own conduct, but the conduct of a third party, the Union, which has been dismissed from the case.

Because both union and employer were before it in **Clayton**, the Court was able to prevent the anomalous result of the employer alone having to defend the union's representation of the employee by holding that neither the employer nor the union can require the employee to exhaust internal union remedies which cannot give full relief or reinstate the grievance. However, this answer is not available here because the employee has abandoned his effort to pursue his action against the union. Equally important, UPS does not even have the opportunity to bring the union into this action as an additional defendant as it could have done had Tinsley sued UPS alone in the first instance. Here the unchallenged final decision of the court of appeals dismissing the action against the union, however wrong it may be under this Court's **Clayton** decision, remains the law of the case and cannot be challenged now by UPS or Tinsley.

Yet the one point on which all nine members of the Court were in complete agreement in **Clayton** was that the employee's claim against the employer should not be

separated from his threshhold claim against the union for breach of the duty of fair representation. Thus, one of the key reasons the majority refused to permit a section 301 action to proceed against an employer while the plaintiff exhausts his remedies against the union was that this course could lead to two separate lawsuits and trials over the same set of facts, "a result that should be avoided if at all possible." 49 U. S. L. W. at 4555. Justice Rehnquist's dissent, which was joined by three other Justices, stated: "The Court's opinion today rights what I view as the principal error in the decision below by requiring the actions against the employer and union to proceed simultaneously." *Id.*

Nevertheless, due to the procedural posture of this case, the decision of the court of appeals, unless vacated by this Court, will permit Tinsley's suit to proceed solely against UPS. For the reasons set forth in UPS's petition for a writ of certiorari, that result would be illogical and fundamentally unfair to UPS, as well as contrary to the observation of this Court in **Vaca v. Sipes**, 386 U. S. 171, 187 (1967), that it makes no sense to "fashion a remedy only with respect to the employer" when the fault of the union must and will be litigated in connection with the plaintiff's claim against the employer.

For the foregoing reasons, as well as for the reasons set forth in the petition, this Court should grant UPS's petition for a writ of certiorari.

Respectfully submitted,

BERNARD G. SEGAL
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Of Counsel

No. 80-1550

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

PAUL E. TINSLEY, JR.,

Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The respondent, Paul E. Tinsley, Jr., asks leave to file the attached Response to Petition For A Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent has not prior to this time in any proceeding in any lower court asked leave to proceed in forma pauperis.

The respondent's affidavit in support of this motion is attached hereto.

Frank E. Wallemann

Frank E. Wallemann
Counsel for the Respondent
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St. Louis, Missouri 63105
(314) 862-4144

NO. 80-1550

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

PAUL E. TINSLEY, JR.,

Respondent

AFFIDAVIT

I, Paul E. Tinsley, Jr., being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the respondent in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to redress in said case. 5. The nature of said cause is briefly stated as follows:

I filed a petition in the Southern District Court of the Southern District of Illinois under Section 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185, in which I alleged that United Parcel Service, Inc. violated the collective bargaining agreement be discharging me and that Highway Drivers, Dockmen, Spotters, Rampmen, Packing House and Allied Products Drivers and Helpers, Office Workers, and Miscellaneous Employees Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called "the Union") breached its duty of fair representation. The district court dismissed my petition as to each of the above parties. The United States Court of Appeals for the Seventh Circuit sustained the dismissal as to the union and reversed as to United Parcel Service, Inc.. United Parcel Service, Inc., filed a

Petition for a Writ of Certiorari on March 11, 1981. In a letter dated May 5, 1981, Alexander L. Stevas, Clerk of the United States Supreme Court requested my attorney of record to file a response to the Petition for Certiorari. I am not possessed of adequate financial resources to bear the expenses of litigation of the matter before the United States Supreme Court.

Paul E. Tinsley, Jr.

Duly witnessed and sworn to before me,
a Notary Public, this 20th day of May, 1981.

Frank E. Wallemann

Frank E. Wallemann, Notary Public

No. 80-1550

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

PAUL E. TINSLEY, JR.,

Respondent

CERTIFICATE OF SERVICE

I, Frank E. Wallemann, a member of the Bar of The Supreme Court of the United States, certify that I did personally on this 21 st day of May, 1981, deposit in a United States post office, with first-class postage prepaid, an Affidavit of Respondent, a Motion for Leave to Proceed in Forma Pauperis, and Response to Petition for a Writ of Certiorari, addressed to the following parties:

Bernard G. Segal
Martin Wald
Nicholas N. Price
Schnader, Harrison, Segal & Lewis
1719 Packard Building
Philadelphia, Pennsylvania 19102

Keck, Mahin & Cate
8300 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Frank E. Wallemann
Frank E. Wallemann

Cert

No. 80-1550

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner

v.

PAUL E. TINSLEY, JR.,

Respondent

RESPONSE TO

PETITION FOR A WRIT OF CERTIORARI

Inasmuch as the issues raised in this Petition are identical to those raised in Clayton v. ITT Gilfillan, 623 F. 2d 563 (9th Cir., 1980), cert. granted, 49 U.S.L.W. 3332(Nov. 3, 1980) (No. 80-54) and the fact that the lower courts are in irreconcilable conflict on the issues raised herein (as discussed fully in the Petition For a Writ of Certiorari), the Respondent supports the Petition For A Writ Of Certiorari.

Therefore the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

Frank E. Wallemann

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